No. 77-1352

In the Supreme Court of the United States

OCTOBER TERM, 1977

OBIE JOE LITTLETON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1978. The petition for a writ of certiorari was filed on March 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the trial court properly conducted jury selection.

3. Whether the trial court correctly instructed the jury on the element of "intent to defraud."

STATEMENT

After a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted on two counts charging that, as an officer of a federal savings and loan association, he participated in the profits or proceeds of several loan transactions with an intent to defraud the association in violation of 18 U.S.C. 1006.[1] He was sentenced to two years' imprisonment. The court of appeals affirmed without opinion (Pet. App.).

From 1963 until March 17, 1976, petitioner served as director, secretary-treasurer, managing officer and member of the loan and appraisal committees of the First Federal Savings and Loan Association of Chilton County, Alabama. In the summer of 1975, petitioner entered into a partnership with two local contractors in the housing construction business, Richard and Ralph Easterling. It was agreed that petitioner would receive one-third of the profits from each house that the contractors built and sold, provided that he secured the necessary financing for the purchasers. Thereafter, petitioner approved loans from the savings and loan company to the purchasers of three of the Easterlings' houses and was compensated for this service with one-third of the construction company's profits. Money from the loans was used to pay petitioner his share of the profits. Petitioner did not inform the association of his arrangement with the Easterlings (Tr. 35-46, 162-164, 221-247, 310, 323, 331, 398, 410).

[1]This was petitioner's second trial. The first trial resulted in a mistrial when the jury was unable to reach a verdict.

The Easterlings paid petitioner in cash for his role in the financing of two of the houses. However, on the third occasion, petitioner directed Richard Easterling to pay him by a check made out to "John A. Hines, Jr." Petitioner then endorsed the check "John A. Hines, Jr.," and deposited it in his bank account. In the course of an unrelated investigation, the "Hines" check was discovered by a county deputy sheriff. In March 1976, the sheriff presented the check to Hines, who stated that he had never seen it before. Three days later members of the board of directors of the savings and loan association first learned of petitioner's participation in the profits from the housing construction. Confronted by the board, petitioner admitted his involvement and was asked to resign. When he did not do so, the association terminated his employment on March 17, 1976 (Tr. 162-164, 201-214, 274-275, 378).

ARGUMENT

1. It is uncontroverted that petitioner accepted a share of the sales profits as payment for obtaining the loans for the purchases of the properties. Nonetheless, petitioner contends that he was entitled to a judgment of acquittal at the close of the government's case, because, on the issue of his intent to defraud, no evidence was adduced that he concealed the scheme from the savings and loan association—albeit petitioner thereafter admitted such concealment when he took the stand in his own behalf.[2] See, Tr. 361-364, 370-372, 398.

Petitioner overlooks the government's proof at trial. In fact, substantial evidence was presented that petitioner attempted to conceal his partnership with the Easterlings

[2]Petitioner claimed that he concealed his participation in the loan proceeds to hide his financial dealings from his ex-wife and not to defraud the association.

from the association and therefore acted with an intent to defraud. Petitioner instructed his attorney to delete his name from the construction company's articles of incorporation until he was no longer employed by the association (Tr. 155-156, 355, 397). He denied to one borrower that he was in partnership with Easterling (Tr. 223). He used a false name, "John A. Hines, Jr.," as payee on the check for his share of the proceeds from one loan (Tr. 365). Moreover, when questioned about the loan by the deputy sheriff, he stated that " 'he did this to keep some bank tellers from talking,' " and asked the sheriff "not to say any more about the check other than what [he] had to say" (Tr. 207, 214). This evidence was sufficient to establish his fraudulent intent.

2. Although recognizing that the trial court has broad discretion in conducting the *voir dire* examination of prospective jurors (Pet. 12), petitioner nonetheless contends that the court's examination in this case was inadequate in several respects. These claims are insubstantial.

a. Petitioner first contends that the trial court should have asked each juror whether he was ever the victim of a crime.[3] Admittedly, such a question might have relevance when there is a discernible victim. (*E.g., United States* v. *Poole*, 450 F. 2d 1082 (C.A. 3) (bank robbery prosecution).) But here the crime was essentially victimless: petitioner was charged with wrongfully profiting from his position as a savings and loan officer, but his activities did not result in a loss to either the savings and loan association or its customers. In these circumstances, the trial court did not abuse its discretion in refusing to ask whether any of the prospective jurors had been crime victims.

[3]The court did ask if any jurors were employed by financial institutions or had obtained a loan from a savings and loan association (Tr. 19-22).

b. Relying on *Sellers* v. *United States*, 271 F. 2d 475 (C.A. D.C.), and *Brown* v. *United States*, 338 F. 2d 543 (C.A. D.C.), petitioner challenges the trial court's failure to ask the prospective jurors whether they would give more credibility to the testimony of a law enforcement officer than a lay witness. Unlike the instant case, both the decisions upon which petitioner relies involved situations where the government relied either heavily or exclusively on the testimony of law enforcement officers to prove its case. But, as the court stated in *Brown, supra*, 338 F. 2d at 545, the failure to ask the credibility question "does not necessarily require reversal;" the court must consider "what part such testimony played in the case as a whole."

Here, the testimony of government agents played but a small part in the context of petitioner's trial. The government relied principally on the testimony of petitioner's partner, Richard Easterling, and Bobby Ray Cook, an officer of the savings and loan association. Of the prosecution's seven witnesses, only two were law enforcement officers, and their brief testimony was corroborated by petitioner's own testimony. A deputy sheriff testified about the "Hines" check (Tr. 205-214) and an FBI agent gave the text of a confession by petitioner (Tr. 247). Petitioner admitted the substance of their testimony (Tr. 409-410, 419-420). Accordingly, the credibility question was unnecessary.

c. Third, petitioner argues that the trial court inadequately probed the extent to which pre-trial publicity affected the prospective jurors' knowledge of the case. The court ascertained that 12 venire members had some prior knowledge, and each of those identified the source of his information and stated that the publicity would not influence his deliberations.[4] Exercising its peremptory

[4]One juror offered that he had heard only a few words about the case, and another juror said she had heard only that petitioner's trial was to commence that day.

challenges, the government struck two of the twelve. Petitioner had ten peremptories to exercise (see Rule 24(b), Fed. R. Crim. P.) and therefore could have removed all of the remaining ten jurors who had some prior knowledge of the case, but did not. He exercised only six peremptories, and of those six only four were used to strike exposed jurors.[5] Having failed to exhaust his peremptory challenges, petitioner cannot complain about a problem which he could have avoided. *Jordan* v. *United States*, 295 F. 2d 355 (C.A. 10), certiorari denied, 368 U.S. 975. As this Court observed in *Frazier* v. *United States*, 335 U.S. 497, 506, "[i]t does not follow that by using the right [to peremptorily challenge jurors] as [petitioner] pleases, he obtains the further one to repudiate the consequences of his own choice."

Moreover, "[i]t is not required * * * that the jurors be totally ignorant of the facts and issues involved" (*Irvin* v. *Dowd*, 366 U.S. 717, 722), and petitioner has made no showing that any of the pre-trial publicity was either biased or inflammatory and therefore likely to prejudice a juror. In *Coppedge* v. *United States*, 272 F. 2d 504 (C.A. D.C.), on which petitioner relies, the defendant made such a showing. The court reversed Coppedge's conviction, holding (*id.* at 508):

> * * *[I]t would have been impossible to have cured in the mind of any reasonable juror the damage done to the cause of Coppedge by the statements in the newspaper articles.

Unlike *Coppedge*, in which the inflammatory publicity came at midtrial, petitioner had the opportunity to select a jury untainted by prior knowledge. In these circumstances, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court" (*Irvin* v. *Dowd*, *supra*, 366 U.S. at 723), which each juror here asserted he could do.

[5]He also failed to use the one peremptory challenge allotted him in the selection of alternate jurors.

3. Petitioner contends that the trial court should have instructed the jury on his "theory of defense," that the jury could consider as evidence of petitioner's good faith that the association did not suffer a financial loss from his transactions. However, petitioner's claim evinces a fundamental misunderstanding of the applicable law. An identifiable loss is simply not an element of the offense prescribed by 18 U.S.C. 1006. Rather, the requisite *mens rea* under the statute is an "intent to defraud." On this element the trial court correctly charged (S. Tr. 16):[6]

> To act with intent to defraud means to act knowingly and with a specific intent to deceive for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self.

See also S. Tr. 22-23. The court also properly instructed the jury that "loss to the association" is not a "necessary element" of the offense (S. Tr. 16, 23).[7] See *Beaudine* v. *United States*, 368 F. 2d 417, 420 (C.A. 5); *United States* v. *Hykel*, 461 F. 2d 721, 722 (C.A. 3); *United States* v. *Weaver*, 360 F. 2d 903, 904 (C.A. 7). Petitioner, therefore, was not entitled to an instruction that the absence of loss to the association evidenced his good faith.

[6]"S. Tr." refers to the supplemental transcript of the jury instructions.

[7]Petitioner did not object to either of these instructions (S. Tr. 19).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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